

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

EAGLE PARLOR TOURS OF VA, INC.,

Respondent.

**Docket No. FMCSA-2008-0114¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On February 7, 2008, the Virginia Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Eagle Parlor Tours of VA, Inc. (Respondent).² The NOC, based on a January 24, 2008 compliance review, charged Respondent with one violation of 49 CFR 386.83(a)(1), operating a commercial motor vehicle in interstate commerce during a period when the owner has been prohibited from operating for failure to pay a civil penalty, with a proposed civil penalty of \$6,910; and one violation of 49 CFR 392.9a(a)(1), operating without the required operating authority, with a proposed civil penalty of \$2,330. The total civil penalty proposed by the NOC was \$9,240.

After Respondent failed to respond to the NOC, the FMCSA's Field Administrator for the Eastern Service Center (Claimant) served a Notice of Default and

¹ The prior case number was VA-2008-0022-US0824.

² See Exhibit A to Field Administrator's Response and Opposition to Petition for Reconsideration (hereafter Claimant's Response).

Final Agency Order (NFAO) on March 19, 2008.³ The NFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective March 24, 2008, with the civil penalty immediately due and payable on that date.

On or about March 24, 2008, Respondent served a Petition for Reconsideration.⁴ The petition claimed that Respondent's failure to timely respond to the NOC was due to excusable neglect because it was unable to pay the previous civil penalty assessed against it because of personal and business-related financial difficulties. However, Respondent did not address the substance of the violations alleged in the February 7, 2008 NOC.

In his Response served August 11, 2008, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order.

2. Decision

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a).⁵ Therefore, it defaulted. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

³ Exhibit B to Claimant's Response.

⁴ Exhibit C to Claimant's Response.

⁵ The NOC reply deadline was March 10, 2008. This date was calculated by adding 30 days to the February 7, 2008 service date of the NOC, an additional five days because the NOC was served by mail, and two more days because the 35th day fell on a Saturday. See 49 CFR §§ 386.8(a) and (c)(3).

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC—that it could not pay the previous civil penalty and the penalty asserted in the February 2008 NOC—did not justify its failure to timely respond to the NOC. Respondent's financial difficulties had nothing to do with its ability to file a timely response to the NOC and do not establish excusable neglect. Furthermore, because Respondent's petition did not address the substance of the violations alleged in the NOC, it did not present any meritorious defenses.

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing its Petition for Reconsideration within one week after receiving the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order if Respondent is unable to demonstrate a meritorious defense.⁶

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁷ Having failed

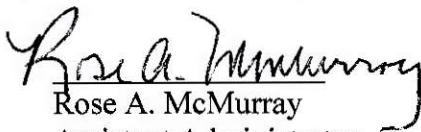
⁶ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

⁷ See *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.⁸

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.⁹

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5-19-10
Date

⁸ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

⁹ The NDFAO stated that the \$9,240 civil penalty was due and payable on March 24, 2008, the date that the NOC would become the Final Agency Order. Because Respondent petitioned for reconsideration on March 24, 2008, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 21 day of May, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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